Petition

No. 81-1169

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MARTIN DEARMAS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARTIN DEARMAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in affirming a District Court decision based on findings of fact and law of issues guaranteed to the Defendant under the Sixth Amendment to the Constitution of the United States, those being; his right to confrontation of witnesses, his right of compulsory process, his right to an impartial jury and his comprehension and understanding in his charge of participating in conspiracy when in fact the Defendant does not speak English.

TABLE OF CONTENTS

QUESTION PRESENTED.....

TABLE OF CONTENTS.....

OPINIONS BELOW.....

JURISDICTION.....

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED.....

STATEMENT OF THE CASE.....

REASONS FOR GRANTING THE WRIT:

I. The government's refusal to disclose their confidential informant's address, which thereby prevented subpoenas to be issued for this presence at the train of the defendant, was a direct violation of the sixth Amendment, rights of the defendant of the United States Constitution to be confronted by material witnesses.

II. The trial court's refusal to strike all members of the panel of venire was an abuse of the trials court's discretion, after a member of the panel made prejudicial comments in the presence of the entire panel, accordingly the Sixth Amendment rights of the defendant was violated to an impartial jury.....

III. Petitioner could not participate in a conspiracy involving knowledge and intent because he lacked the capacity to understand due to his inability to speak the English language.....

CONCLUSION.....

APPENDIX

Page

A. Decision of jury and order of United States District Court Judge, Southern District of Florida.....1

B. Opinion of the United States Court of Appeals Eleventh Circuit dated September 10th, 1981 5

C. Judgement Circuit Court of Appeal October 7th.....10

D. Sixth Amendment 4

TABLE OF CONTENTS
CASES

Chambers v. Mississippi, 410 U.S. 284 (1973).....4, 5

Faretta v. California, 422 U.S. 806 (1975).....5

Irvin v. Dodd, 366 U.S. 717 (1961).....9

McAllister v. Brown, 555 F2d 1277 (1977).....4

Murphy v. Florida, 421 U.S. 794 (1975).....8

Roviaro v. United States, 353 U.S. 53 (1957).....7

Shuler v. Wainwright, 514 F2d 150 (1974).....4

Truman v. Wainwright, 514 F2d 150 (1975).....4

United States v. Ayala, 643 F2d 244 (1981).....7

Page

United States v. Boyd, 446 F2d 1267 (1971)..... 10

United States v. Harbin, 601 F2d 773 (1979)..... 12

United States v. Haynes, 398 F2d 980 (1968)..... 9, 10

United States v. Menichino, 497 F2d 935 (1974)..... 12

United States v. Middlebrooks, 618 F2d 273 (1980)..... 12

United States v. Opager, 589 F2d 799 (1979)..... 7

United States v. Owen, 492 F2d 1100 (1974)..... 12

United States v. United States Gypsum Co., 43 U.S. 445 (1978)..... 11

STATUES

United states Constitution :

Amendment IV.....

United States Code :

18 U.S.C. §2.....

21 U.S.C. §841 (a) (1).....

21 U.S.C. §846.....

28 U.S.C. §1291.....

OPINIONS BELOW

The Memorandum decision of the jury and Order of the United States District Court for the Southern District of Florida is set forth in the Appendix.

The Opinion and Judgement of the United States Court of Appeals for the Eleventh Circuit unpublished is set forth in the Appendix.

JURISDICTION

The Judgement of the United States Court of Appeals for the Eleventh Circuit, for which review is sought, was entered on October 7, 1981 and this petition is filed timely, pursuant to Rule 20.2 of this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent clauses of the United States Constitution, Amendment Sixth, which is set forth in the Appendix.

STATEMENT OF THE CASE

The Petitioner, Martin Dearmas, on June 26th, 1980, was indicted by the Federal Grand Jury in Miami, Florida and charged with one count of conspiracy to possess with intent to distribute methaqualone under 21 U.S.C. §846; one count of possession of methaqualone with intent to distribute under 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2; and one count of distribution of methaqualone under 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2.

Prior to trial, Petitioner filed a motion for disclosure of the government's confidential informant. The trial court granted Petitioner's motion and provided the government with two alternative methods of compliance. On August 19, 1980 the informant was made available to the Petitioner for an interview.

Petitioner, then filed a motion to adopt co-defendant's motion to dismiss the indictment. This motion was granted by the court. The motion to dismiss was based upon informant's refusal to be interviewed and failure of the government to provide the informant's address. The trial court denied the motion to dismiss.

On August 26, 1980 trial was held before the court. During the trial, Petitioner moved to strike the entire jury panel or, alternatively, to strike two of the jurors for cause because of their responses to questions propounded during the voir dire of the jury panel. The trial court denied the motion (T.55). At the close of the government's case Petitioner renewed all prior motions and objections and moved for a directed verdict (T.308). The court denied all motions (T.308). Petitioner was found guilty and subsequently sentenced to three (3) years imprisonment with an additional parole of three (3) years.

A timely Notice of Appeal was filed by Dearmas, to the Circuit Court. Jurisdiction was conferred by 28 U.S.C. §291. Briefs were filed and the case was denied in a per curiam opinion

by Tjoflat, Fay and Henderson. On September 10, 1981 the Circuit Court filed an unpublished per curiam opinion which concluded that "Finding no error in the trial proceedings, the appellants convictions are affirmed." A mandate by the same court was filed on October 15, 1981.

REASONS FOR GRANTING THE WRIT

I. THE GOVERNMENT REFUSAL TOGETHER WITH THE CONFIDENTIAL INFORMANT'S REFUSAL TO DISCLOSE HIS ADDRESS MADE IT IMPOSSIBLE FOR THE DEFENDANT TO EXERCISE HIS COMPULSORY ATTENDANCE AT THE TRIAL BY ISSUING A PROPER SUBPOENA, WHICH WAS A VIOLATION OF THE RIGHTS OF THE DEFENDANT UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A confidential informant was present when Petitioner alledgedly sold methaqualone to Ms. Beaver, an undercover D.E.A. agent. Before trial Petitioner moved for disclosure of the identity of the confidential informant that led to the arrest. The trial court granted Petitioner's motion and ordered the government to produce the confidential informant by either supplying the name and address of the informant or in the alternative to make the informant available for interview by defense counsel prior to trial.

On August 19, 1981 the informant was made available to the Petitioner for the interview. At the interview the informant was requested to disclose his residence and answer other questions propounded by

the defense counsel. The informant appeared and refused to disclose his residence and thereafter refused to answer any questions by the defense counsel.

Petitioner's counsel, adopting a co- Defendant's Motion to Dismiss, made a similar motion to dismiss the proceedings because the informant refused to be interviewed and further that the government would not provide Petitioner with informant's address. The trial court erroneously denied the motion to dismiss the indictment.

The Sixth Amendment to the United States Constitution affords the accused in all criminal prosecutions the right to be confronted with the witnesses against him. The rights to confront and to cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. See Chambers v. Mississippi, 410 U.S. 284 (1973), Truman v. Wainwright, 514 F2d 150 (1975).

In Shuler v. Wainwright, 491 F2d 1213 (1974), the court noted that the defendant has no right to confront a witness who provides no evidence at trial. The informat unless called can not be termed a witness against the defendant, McAllister v. Brown, 555 F2d 1277 (1977). In Shuler the defense chose not to attempt to call the confidential informant as a witness. In McAllister the defense never demanded that the the informants identity be disclosed.

In the instant case, Petitioner attempted to gain the informant's address, to call the informant as a possible witness. The informant was a possible witness who could verify the Petitioner's defense that he spoke no English and that he had not known or understood that Ms. Beaver, the undercover agent, and Sanchez, the defendant, were engaging in a drug "buy". The only other person present in the room at the time of the alleged "buy", the only person besides Ms. Beaver, who was not a defendant in the case is the informant, Mr. Lasso.

The right to confront and to cross examine a witness is essential to due process, Chambers v. Mississippi, supra. In the instant case the failure of the government to produce Lasso's address amounted to a denial of due process. The government was under an obligation to either provide the name and address of the informant or grant Petitioner an interview. The interview was a nullity. The government interfered with Petitioner's right to confront the witnesses against him by refusing to comply with the order. The trial court erred in refusing to grant a dismissal based on the violation of Petitioner's due process rights.

Further, by not providing the address the government interfered with Petitioner's due process right to make his defense. In Faretta v. California 422 U.S. 806 (1975) the Supreme Court explained the interaction of the Sixth Amendment with the due process clause of

the Fourteenth Amendment. "The Sixth Amendment includes a compact statement of the rights necessary to a full defense:..." "Because these rights are basic to our adversary system of criminal justice they are part of the "due Process of Law" that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the states. The rights to notice, confrontation and compulsory process when taken together guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it, " 422 U.S. at 819.

The government's refusal to disclose the informant's address denied Petitioner the right to make a defense as we know it. The Petitioner was denied a fiar trial and the trial court erred in not dismissing the indictment, due to the fact that Petitioner was prejudiced in his opportunity to prepare an effective defense.

Further, the trial court by its order, made a positive determination that the informant was critical witness and that his identity ought to be disclosed to Petitioner. In the instant case failure to disclose the informant's address amounted to a failure to disclose the informant's

identity due to the fact that the interview was nullity. He could not be summons with out an address to serve him.

In Roviaro v. United States, 353 U.S. 53, 60-61 (1957) the Supreme Court held that "fundamental requirements of fairness" are offended when the government refuses to disclose the name of an informer whose testimony will be relevant and helpful to the defense... or is essential to a fair determination of the cause". In the instant case Mr. Lasso's testimony was necessary to the defense. Lasso's testimony would be directly relevant to proving that Petitioner was not a participant in the transaction. See United States v. Ayala, 643 F2d 244 (1981).

In United States v. Opager, 589 F2d 799 (1979) the United States Court of Appeals for the Fifth Circuit was faced with an analogous situation to the case at hand. In Opager, the government failed to disclose the whereabouts of an identified informant pursuant to a court order. In that case the court stated that the court effectively thwarted Opager's efforts to prepare a full defense. "A conviction obtained under such circumstances is vulnerable indeed", 589 F2d at 804.

In the instant case, the government's failure to disclose Lasso's whereabouts resulted in a violation in Petitioner's right of due process. Petitioner was prevented from preparing an effective defense. Furthermore, Petitioner's Sixth Amendment rights of confrontation and compulsory process were also violated. Petitioner, therefore contends that

trial court erred in not dismissing the indictment.

II. THE TRIAL COURT SHOULD HAVE STRICKEN THE ENTIRE JURY PANEL AFTER IT WAS EXPOSED TO HIGHLY PREJUDICIAL REMARKS BY ONE OF THE MEMBERS VOIR DIRE. THE TRIAL COURT'S REFUSAL TO STRIKE THE ENTIRE PANEL THAT HEARD THE REMARKS WAS AN ABUSE DISCRETION AND DENIED THE DEFENDANT HIS RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court erred in refusing to strike members of the venire. The Sixth Amendment guarantees the accused in all criminal prosecutions the right to a trial by an impartial jury.

Prospective juror No. 9, Mr. Cole, related his dissatisfaction about his prior jury service, on a narcotics case, to the trial court and other members of the venire. (T.53-56, 77-81)

The Petitioner moved to strike the panel on the grounds that Mr. Cole's statements gave the other jurors the impression that no matter what happened, no matter if they found the Petitioner guilty, the courts would set the Petitioner free. (T.54-55) The trial court refused to strike the panel, claiming there was no prejudice since Mr. Cole said he thought he could still be fair. (T.54-56)

In Murphy v. Florida, 421 U.S. 794 (1975) the Supreme Court noted that the constitutional standard of fairness requires that

a defendant have a panel of impartial indifferent jurors. At the same time the jurors assurances that he is equal to this task can not be dispositive of the accused's rights. 421 U.S. at 800.

In the instant case an inference of actual prejudice should have been drawn from Mr. Cole's statements. In Irvin v. Dodd, 366 U.S. 717 (1961) the court stated that a juror who has formed an opinion can not be impartial. The test is whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question is one of mixed law and fact. In United States v. Haynes, 398 F2d 980 (1968) the court stated a test to utilize in determining prejudice. Statements upon voir dire are totally irrelevant, a person may declare that he feels no prejudice in the case and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice because in general persons in a similar situation would feel prejudice.

Mr. Cole had formed an opinion as to defendants in narcotic's cases; that no matter what the jury decided, the courts would set the defendant free. These statements were highly prejudicial. Under the Average Man Test formulated in Haynes a determination is made whether general persons in similar situations would feel prejudice, and statements made on vior dire are ignored. The average person with this opinion would think that it would not matter how they decided.

Mr. Cole was not an impartial juror.

Mr. Cole's prejudicial statements effected the jury panel. One other potential juror remarked, after Mr. Cole's statement, "May I say that just by reading accounts in the newspaper, so many times you read of arrests of Colombians and Latin names, people in connection with drugs, that I sometimes wonder about it." (T.127)

Mr. Cole had formed an opinion as to verdicts in narcotics cases. The jury panel was effected by the statement of his opinion. The trial court erred in its refusal to strike the entire jury panel due to the fact that Petitioner did not receive a trial by an impartial jury.

The trial court should have striken for cause the venire member who made the prejudicial remarks.

The trial court refused to strike for cause, Mr. Cole. The refusal of the trial court to remove the juror for cause was to reduce the number of Petitioner's preemptory challenges. The effect of this action resulted in an impariment of a substantial right which would require reversal. United States v. Boyd, 446 F2d 1267 (1971).

In the instant case Petitioner did not use all his preemptory challenges. In United States v. Haynes, supra, the court held that the Appellant did not waive his right to challenge the jury when he declined to exercise his nine remaining preemptory challenges.

As noted above Mr. Cole had formed an opinion as to criminal defendants in narcotics cases. This opinion prevented him from being an impartial juror. The trial courts refusal to remove Mr. Cole for cause resulted in the impairment of a substantial right which would require reversal.

III. THE DEFENDANT SUBMITS IN A CONSPIRACY INVOLVING KNOWLEDGE AND AN INTENT THAT HE COULD NOT HAVE PARTICIPATED BECAUSE HE DOES NOT HAVE THE CAPACITY, DUE TO THE FACT ESTABLISHED AT HIS TRIAL BY TESTIMONY THAT HE DOES NOT SPEAK, READ OR WRITE THE ENGLISH LANGUAGE.

At the trial Petitioner relied on the defense that he spoke no English and therefore did not comprehend the conversation of the D.E.A. agent, Ms. Beaver and Sanchez, co-defendant that was conducted in English nor could he comprehend that it involved any drug transaction (T. 162-169).

In United States v. United States Gypsum Co., 438 U.S. 445 (1978), the court stated that "In a conspiracy two different types of intent are generally required - The basic intent to agree which is necessary to establish the existence of the conspiracy and the more traditional intent to effectuate the object of the conspiracy". 438 U.S. at 445. The second part of the Gypsum intent test is the specific intent to accomplish some further goal or mean. Petitioner did not understand

English nor did he understand what was going on. Therefore, he could not form the specific intent that is required for a conviction of conspiracy.

Further, the conspirator must knowingly agree to join others to bring about a common goal. United States v. Middlebrooks, 618 F2d 273 (1980). Finally, for an accused to be convicted of unlawful conspiracy there must be proof beyond a reasonable doubt that a conspiracy existed that he knew of it and that with this knowledge he voluntarily became part of it. United States v. Harbin, 601 F2d 773 (1979).

In the case at hand the prosecution did not establish the requisite burden of proof. The prosecution did not prove that Petitioner knew about the conspiracy nor did he prove beyond a reasonable doubt that Petitioner voluntarily became a part of the conspiracy. An individual's mere presence at the scene of the crime or mere association with persons involved in a criminal enterprise is not sufficient to prove conspiracy. United States v. Menichino, 497 F2d 935 (1974). United States v. Owen, 492 F2d 1100 (1974).

CONCLUSION

Petitioner urges review of the judgement of the circuit court which affirmed the district court. If allowed to stand, the decisions below will result in a lessening of the Constitutional guarantees of the Sixth Amendment.

Petitioner respectfully prays this Court to grant a writ of certiorari

to review and ultimately to reverse the judgement entered below.

Respectfully submitted,

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APPENDIX

JURY VERDICT AND SENTENCING BY DISTRICT COURT

THE CLERK: Members of the jury, when your name is called, if the verdict as published is your verdict, please answer, "That is my verdict."

(Thereupon the jury was polled.)

THE CLERK: Your Honor, the jury has been polled.

THE COURT: Let the verdict which was been duly published, upon which the jury has been polled, be duly recorded.

Have the defendant come forward, please.

Mr. Dearmas, the jury has returned a verdict finding your guilty of Count One, guilty of Count Two, guilty of Count Three.

Based on that jury verdict, it is the judgement of the Court, and I adjudicate you, to be guilty of Count One, guilty of Count Two, guilty of Count Three.

Before sentence in this case, I am going to order a presentence investigation which will be conducted by that pretty young lady in the second row.

I urge you to cooperate with her fully and be sure that every matter that you want me to be aware of is brought to my attention as to your background and anything that you want me to know in arriving at a just and proper sentence in this case.

You have been represented by extremely competent counsel, and he will aid and assist you in this regard.

I want the agent to take possession, take charge, of the Exhibits and have them here ready tomorrow morning at 9:00. I know you are having difficulties getting things out of the warehouse.

Bring the jury in.

(Thereupon the jury returned to the courtroom and the following proceedings were had:)

THE COURT: Ladies and gentlemen, please take your seats, if you will.

Have you arrived at a verdict in this case?

THE FOREMAN: Yes, we have.

THE COURT: Give it to the Marshal, please.

The clerk will please publish the verdict.

THE CLERK: Will the jury please rise and harken to their verdict.

"United States District Court, Case No. 80-250-Criminal-JWK. United States of American versus Martin Dearmas. Verdict: We, the jury, find the defendant, Martin Dearmas, as to Count One, guilty; as to Count Two, guilty; as to Count Three, guilty. So say we all. Dated at Miami, Florida, this 27th day of August, 1980. Dr. Elaine Liftin, Foreperson."

THE COURT: Poll the jury, please.

I would remind counsel that the sentencing process is

every bit as much an adversary proceeding as this trial, and I urge you to be an advocate on the defendant's behalf.

You, sir, will have the absolute right to see and review the report which is ultimately sent to this Court. I want you to be sure that you review the report carefully, and, by the time we come to sentencing, that you agree that it is absolutely true and correct or that any errors in the report to be brought to the attention of the Probation Department and, if they cannot clarify the matter for you, bring it to my attention.

I am going to order that you return to Court on the date of sentence. That date is unknown at this time because we do not know how long it will take to complete the presentence report.

By this order, I think this will make your bail responsive, and, unless the Government has some violent objection, I will permit him to remain on the same bail.

MR. TANZLER: I have no objections.

THE COURT: The Government having no objections, I will permit you to remian on the same bail that you are presently under.

Is there anything else to come before the Court?

MR. TAYLOR: I do not recall what the maximum time allowed is for the filing of post-trial motions.

THE COURT: I think it is seven days.

MR. TAYLOR: Is there a provision for extension in the Federal Rules?

THE COURT: Yes, I believe so.

MR. TAYLOR: Can you extend it? If so, we make that request at this point that you give us two weeks or whatever for the filing of post-trial motions.

THE COURT: You better take a look at it, because I can extend it, but not beyond a certain period.

MR. TAYLOR: Let me rephrase my motion.

Will you give us the maximum time allowed by law?

THE COURT: I will extend the time for filing of motions for a new trial and any motions to be filed--I will order that you do not have to file your notice of appeal yet--any motions, and, more particularly, for a new trial, I will extend it until Friday, September 12th.

MR. TAYLOR: That is fine.

As far as the bond status, Mr. Tanzler asked the question as to what my recollection was, and my recollection is that it is a $30,000 corporate surety and $30,000 or $20,000 on the house.

MR. TANZLER: I have it as $20,000 corporate surety.

MR. TAYLOR: It is $20,000 corporate surety and a $30,000 mortgage, which was duly recorded on his house at the order of the Magistrate. He is not running anywhere.

THE COURT: We will be in recess at this time.

(Thereupon the trial was concluded at 4:50 p.m.)

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

UNIT B

NO. 80-5766
Summary Calendar

UNITED STATES OF AMERICAN,

Plaintiff-Appellee,

versus

HUGO SANCHEZ,
MARTIN DEARMAS,

Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Florida

(September 10, 1981)

Before TJOFLAT, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

After separate jury trials in the United States District Court for the Southern District of Florida, both appellants were convicted of conspiracy to distribute, distribution, and possession with intent to distribute methaqualone, in violation of 21 U.S.C. § §841, 846. Finding no error in the appellants' convictions, we affirm.

Martin Dearmas assigns as error the trial court's refusal to strike the entire panel or, alternatively, to strike two of the jurors, Charles Cole and Mrs. Sarkisian, for cause because of their responses to questions propounded during the vior dire of the jury panel.

Charles Cole stated that he had previously served on a jury which had found a criminal defendant guilty and he was disturbed to learn that the defendant had been found not guilty after a second trial. T.78. He further said that he could be fair in his judgement in the present case. Mrs. Sarkisian remarked that reading accounts in the news of so many drug related arrests of people with Latin names made her "sometimes wonder." She also stated that she would be fair and would reach her decision based on the evidence presented at the trial. T.127.

Dearmas contends that Cole's remarks demonstrated his lack of impartiality and that this prejudice spilled over to the entire panel, particularly Mrs. Sarkisian, since they were present during the questioning. These contentions are without merit. A juror need not possess an absence of any preconceived notion as to guilt or innocense. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1979); Irvin v. Dodd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed2d 751 (1961). While a juror's assurances that he is equal to the task cannot be dispositive of the accused's rights, the burden rests on the defendant to demostrate the

actual existence of such an opinion as will raise the presumption of partiality. Murphy v. Florida, supra. In reviewing the district court's refusal to excuse a juror for cause, we may not overturn its decision unless there was an abuse of discretion. United States v. Horton, 646 F.2d 181 (5th Cir. 1981); United States v. Goodman, 605 F.2d 870 (5th Cir. 1979). Here, there is ample evidence to support the trial court's conclusion. The appellant did not use all his preemptory challenges, of United States v. Boyd, 446 F.2d 1267 (5th Cir. 1971), and both Cole and Mrs. Sarkisian stated that they could render impartial verdicts. After having reviewed the record of the voir dire proceedings, we find no evidence of any abuse of the trial court's discretion.

Hugo Sanchez appeals the trial judge's refusal to strike the following testimony of DEA Agent Beaver:

> Q. Describe for the court and the jury how that contact came about and the circumstances surrounding that contact, please.
>
> A. Yes, I will. On May 21, 1980, I was at the Westland Mall in Hialeah, Florida. I was there negotiating with Mr. Molina for the purchase of 25,000 quaaludes.

T. 26. Molina was not a defendant in the case and was not involved in the conspiracy. Sanchez objected on the grounds that Beaver's testimony was irrelevant. In answering the question, Agent Beaver was merely explaining why she happened to be at the Westland Mall on that day and at that time. While it is true that relevent evidence may be excluded if its probative value is substantially outweighed by the danger of prejudice,

F.R. Evid. 403, the determination of the admissibility of evidence rests largely within the trial court's descretion. United States v. Gorel, 622 F.2d 100 (5th Cir. 1979); United States v. Grimm, 568 F.2d 1136 (5th Cir. 1978); United States v. Cohen, 544 F.2d 781 (5th Cir.), cert. denied, 431 U.S. 914, 97 S.Ct. 2175, 53 L.Ed.2d 224 (1977); United States v. Ashley, 555 F.2d 462 (5th Cir.) cert. denied, Leveritte v. United States, 434 U.S. 869, 98 S.Ct. 210, 54 L.Ed.2d 147 (1977). The district judge may well have concluded that the chance that the jury would interpret Agent Beaver's remarks to mean that the defendant was involved in other investigations or drug deals was so slight that it could not have been prejudicial. In any event, the evidence against the appellants was so overwhelming that any error that could possibly have occurred as a result of Beaver's testimony was harmless beyond a reasonable doubt. F.R. Crim.P. 52 (a); see e.g., United States v. Heller, 625 F. 2d 594 (5th Cir. 1980); United States v. Morgan, 562 F.2d 1001 (5th Cir.) cert. denied, Morgan v. United States, 434 U.S. 1050, 98 S.Ct. 899, 54 L.Ed.2d 802 (1977).

Both appellants complain of the trial court's denial of their motion to dismiss the indictment. The motion was filed in response to the government's refusal to reveal the address of an informant who was not called as a witness at the trial. The government did, however, comply with the magistrate's order requiring production of the informant,

and the informant was interviewed by defense counsel. Precisely what inferred from the briefs that the informant did not answer questions asked of him. The appellants' demand for the informant's address is without merit for several reasons. First, the informant was not called as a witness, so the appellants' sixth amendment right to confront witnesses against them was never activated. McAllister v. Brown, 555 F.2d 1277 (5th Cir. 1977); Shuler v. Wainwright, 491 F. 2d 1213 (5th Cir. 1974). Moreover, while the government is required to disclose the identity of an informant whose testimony will be relevant and helpful to the defense, Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1L.Ed.2d 639 (1957); United States v. Ayala, _____ F.2d _____ No. 79-5591 (5th Cir. April 20, 1981), in this case, the government did reveal the informant's identity and made him available for an interview. After the interview defense counsel made no effort to call the informant as a witness. It is the informant, not the government, who must decide whether he will cooperate by being interviewed, see United States v. Opager, 589, F.2d 799 (5th Cir. 1979), and the appellants cannot complain because of the refusal of an informant who was not called as a witness to answer the appellants' questions.

Finding no error in the trial proceedings, the appellants convictions are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

U.S. COURT OF APPEALS
FIFTH CIRCUIT
FILED
OCT 7 - 1981
CLERK

NO. 80-5766

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HUGO SANCHEZ,
MARTIN DEARMAS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(October 7, 1981)

Before TJOFLAT, FAY, and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

...F AND LOCAL
...DAY OF THE
...DATE

234